SUPREME COURT, U.S.
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JOSEPH F. SPANIOL, JR.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

(3)

No. 87-1277

A.L. LOCKHART, Director,
Arkansas Department of Correction,

Petitioner,

v.

JOHNNY LEE NELSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney for Respondent

January 25, 1988

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The respondent, Johnny Lee Nelson, respectfully requests that this Court deny the petition for writ of certiorari to the Eighth Circuit in this case.

STATEMENT OF THE CASE

Respondent is a petty thief with a criminal history going back to 1960.[1] The case that brings us here is Union County Circuit Case No. CR79-22 where he was first convicted in 1980 of the felony breaking and entering into a vending machine and misdemeanor theft of property. His prior convictions required that he be sentenced as an habitual offender under Arkansas law. He was originally sentenced by a jury to 40 years on the burglary charge and one year concurrent on the theft charge. That conviction was reversed by the Arkansas Supreme Court.

Respondent came back to the Circuit Court and pled guilty to the charges but requested that a jury determine his sentence. At his sentencing trial on March 12, 1982, Nelson told his lawyer that he had been pardoned on one of the convictions that the state used against him, but his lawyer made no objection. The court and the prosecutor heard Nelson's statement to counsel on the pardoned prior but quibbled over it and decided to use it anyway. The jury thus heard of the four prior convictions, but it sentenced him only to the minimum possible with four priors: twenty years.

Respondent Nelson appealed the use of the prior pardoned conviction to enhance his sentence, but the Arkansas Court of Appeals held in an unpublished opinion that, since no objection was made by defense counsel, it could not consider the issue on appeal. It was accordingly suggested that Nelson seek post-conviction relief. *Nelson v. State*, Ark.App. No. CACR83-160 (May 2, 1984; unpublished).

Nelson petitioned the Arkansas Supreme Court for post-conviction relief, and that court held that his "bare assertion" he was pardoned was not a sufficient basis to grant relief. *Nelson v. State*, Ark.S.Ct. CR84-133 (Nov. 19, 1984; unpublished).

Nelson, all this time acting *pro se*, then sought relief in the United States District Court for the Eastern District of Arkansas. At this point, the state conceded that Nelson was pardoned on one of the convictions used against him.[2] Ultimately, the district court which granted the writ holding that the Double Jeopardy Clause of the Fifth Amendment prohibited the state from resentencing Nelson as an habitual offender. *Nelson v. Lockhart*, 641 F.Supp. 174, 178-84 (E.D. Ark.1986). The Eighth Circuit affirmed. 828 F.2d 446 (8th Cir.1987).

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[1] Respondent's record in Union County Circuit Court is as follows:

Date	Case No.	Charge	Disposition
1-26-60	9065	Grand Larceny	1 yr.
4-5-60	9078	Assault w/i rape	14 yrs.--PARDONED
4-5-60	9090	Robbery	7 yrs.
8-31-72	11194	Poss.Stolen Prop.	18 mo. suspended
8-31-72	11213	Poss.Stolen Prop.	18 mo. suspended
7-30-73	11604	Trespassing (misd)	1 yr. suspended
8-22-74	CR74-89	Revo. in 11604 (misd)	53 days with credit for 43 days
7-25-74	CR74-137	Burg. & G.Larceny	21 years w/10 susp.
7-22-80	CR79-22	Burg. & Misd.Theft	40 years burg., 1 yr. theft--REVD
3-12-82	"	" (on remand)	20 years

The last conviction is the one at issue here.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Holding of the Eighth Circuit Below Follows* Burks *and* Bullington *and Is Correct.*

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). This rule also applies to separate sentencing proceedings,

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[2] *See* note 3, *infra*.

too. *Bullington v. Missouri*, 451 U.S. 430 (1981); *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir.1982), *vacated on other grounds* 459 U.S. 1139, *on remand* 708 F.2d 1020 (5th Cir. 1983), *habeas corpus proceeding Ex Parte Bullard*, 679 S.W.2d 12 (Tex.Crim.App. 1984).

Under Arkansas law, prior convictions are facts to be proved beyond a reasonable doubt by the prosecution in the sentencing phase of the case. Ark.Stat.Ann. § 41-1003. The holding of the Eighth Circuit only prevents the state from retrying the sentencing phase of the case against Nelson and then mustering proof that it never presented before. There is nothing inconsistent with that result and *Burks, supra.*[3]

2. The Holding of the Eighth Circuit Follows Other Federal Appeals Courts, So This Case Does Not Justify Review in This Court.

While the petitioner cites a large number of cases seeking to show a conflict between the circuits or states, respondent submits that different cases are relevant to the inquiry here of whether resentencing violates the Fifth Amendment. The decisions from federal appeals courts are in accord.

Bullard v. Estelle, supra, 665 F.2d 1347, is virtually on all fours with this case. In *Bullard*, the jury found the facts as to both guilt and innocence and the number of priors beyond a reasonable doubt. The Fifth Circuit held that where the state was found on appeal to have failed to have proved a prior conviction, it was precluded by the Double Jeopardy Clause from proving any other prior convictions it could have proved at the trial but did not. To do so, the

[3] Respondent also notes that the state's conduct here was less than fair because the state intentionally and unjustifiedly stonewalled petitioner (with the tacit approval of the Arkansas courts) on the factual issue of his pardoned conviction at every phase of the case for three years until Chief Judge Eisele directed the state to inquire of the Arkansas Secretary of State's Office of whether, in fact, petitioner had been pardoned. That inquiry finally resulted in the resentencing order.

court reasoned, would give the state "two bites at the apple" on a question of fact, something expressly prohibited by the Double Jeopardy Clause. The court followed *Burks* and *Bullington, supra*.

That is precisely what happened here, and both courts below found *Bullard* to be persuasive authority and followed it.

Other courts litigating this same issue have come to the same conclusion: *French v. Estelle*, 692 F.2d 102 (5th Cir.1982); *Briggs v. Procunier*, 764 F.2d 368 (10th Cir. 1985); *Ex Parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982); *People v. Quintana*, 634 P.2d 413, 417 & n.2, 419 (Colo.1081); *State v. Hennings*, 100 Wash.2d 379, 670 P.2d 256, 258, 261 (1983).

Cases seemingly *contra* are: *State v. Cullen*, 646 S.W.2d 850 (Mo.App.1982); *People v. Sailor*, 65 N.Y.2d 224, 491 N.Y.S.2d 112, 480 N.E.2d 701, 710 (1985).

The petition for certiorari makes this case more complicated than it really is, and the cases it cites go far beyond the facts of this case and the fact it involves a separate sentencing phase.

CONCLUSION

The net result is the three federal appeals courts have decided this precise issue, and they are all in accord. Supreme Court review is not justified, and the Petition for Writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
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(502) 371-9131

Attorney for Respondent

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FEB - 3 1988

RESPONDENT'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Johnny Lee Nelson, asks leave to file the enclosed memorandum in cpposition to the petition for writ of certiorari and to proceed in forma pauperis. Respondent has been granted leave to so proceed in both the district court and in the court of appeals. No affidavit is attached since the U.S. District Court originally appointed counsel for respondent under the Criminal Justice Act in the original proceedings before the proceedings at issue here.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Attorney for Respondent

January 25, 1988

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., swear that I have served a copy of this motion on the Attorney General of Arkansas, 201 E. Markham Street, Little Rock, Arkansas 72201 by mail this 25th day of January, 1988.

John Wesley Hall, Jr.

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., swear that I have served a copy of this motion on the Attorney General of Arkansas, 201 E. Markham Street, Little Rock, Arkansas 72201 by mail this 26th day of January, 1988.

John Wesley Hall, Jr.

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